

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiff	)	
	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants	)	
	)	
STATE OF ARKANSAS	)	
ARKANSAS NATURAL RESOURCES	)	
COMMISSION	)	
	)	
Intervenors	)	
_____	)	

**MOTION TO DISMISS**

The State of Arkansas, ex rel. Mike Beebe Attorney General, and the Arkansas Natural Resources Commission (collectively “Arkansas”) submit this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) for the Court’s lack of subject matter jurisdiction over the claims made in this lawsuit by the State of Oklahoma and the Oklahoma Secretary of the Environment and pursuant to Rule 12(b)(6) for the failure to state a claim upon which relief may be granted. Arkansas takes no position with respect to any individual damage claim against any named defendant. Arkansas' motion solely challenges the unprecedented assertion by the State of Oklahoma that it should be allowed to override the sovereignty of the State of Arkansas and to ignore the constitutional protections afforded the State of Arkansas and its citizens, as well as the rights to which Arkansas is entitled under the terms of the Compact.

In support of this Motion, Arkansas submits the following:

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1. The State of Arkansas is a member of the Arkansas River Basin Compact (the “Compact”). The Compact was codified by the legislature of Arkansas at Ark. Code Ann. § 15-23-401. The filing of this Motion has been authorized by Attorney General Mike Beebe.

2. C. Miles Tolbert is the Oklahoma Secretary of the Environment. The State of Oklahoma is also a member of the Compact. The Compact was codified by the legislature of Oklahoma at 82 Okla. Stat. § 1421. (Both Mr. Tolbert and the State of Oklahoma will be collectively referred to as “Oklahoma.”)

3. The Arkansas Natural Resources Commission is the state sanctioned regulatory agency with authority over, among other things, the comprehensive nutrient management program enacted in the State of Arkansas.

4. The Compact by its terms created an interstate administrative agency, the Arkansas-Oklahoma Arkansas River Compact Commission (“the Commission”), designated to oversee proper administration of the Compact. Compact, art. IX.A.(7). The Commission is comprised of three commissioners from each State. *Id.*, Art. VIII.B. & C. The Commission may also include a seventh commissioner - as its non-voting chair, *id.*, Art. VIII.A. - who represents the United States. *Id.*

5. The Compact vests within the Commission power to develop its own rules and regulations, *id.*, Art. IX.A.(5), and to “[h]old hearings and compel the attendance of witnesses for the purpose of taking testimony and receiving other appropriate and proper evidence and issuing such appropriate orders as it deems necessary for the proper administration of this Compact,” *id.*, At. IX.A.(7). Under the terms of the Compact, the Commission must additionally “[c]ollect, analyze and report on data as to stream flows, water quality, annual yields and such other information as is necessary for the proper administration of this Compact.” *Id.*, Art. IX.B.(2).

## I. INTRODUCTION

6. This Motion is brought by the State of Arkansas on behalf of itself and as *parens patriae* for the citizens of Arkansas to dismiss the claims filed by the State of Oklahoma and the Oklahoma Secretary of the Environment as they are directed to activities occurring within the State of Arkansas, because the claims filed therein and the recovery sought, as applied to activities occurring within the State of Arkansas would violate Arkansas's rights under the Compact, provisions of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3), the constitutional guarantee that each State entered the Nation with its sovereign powers intact, and the rights of the citizens of Arkansas under the Due Process Clause (U.S. Const. amend. XIV). The State of Arkansas takes no position on the specific damage claims brought against specific private party defendants insofar as those claims would apply Arkansas law to conduct within Arkansas and Oklahoma law to conduct within Oklahoma. Furthermore, Arkansas takes no position on the validity of claims made concerning the nature or the extent of pollution in the Illinois River Watershed. Arkansas' Motion to Dismiss deals solely with the illegality of the claims made as they affect the sovereignty and constitutional protections afforded the State of Arkansas and its citizens, as well as the rights to which Arkansas is entitled under the terms of the Compact.

7. Arkansas and Oklahoma entered into the Compact to address issues of water quality and apportionment in the Arkansas River Basin. As part of the Compact, both States agreed to cooperatively resolve their mutual grievances concerning these issues under the auspices of the Commission, in lieu of litigation. Moreover, both States agreed that, as part of this cooperative process, each State would use its authority to address water quality issues within its own borders and would not attempt to regulate affairs within the other State. Oklahoma has expressed recent dissatisfaction with Arkansas' efforts to abate pollution on the Arkansas side of

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the Illinois River Watershed (a watershed within the Arkansas River Basin), and, in its efforts to address its dissatisfaction, has focused on economic activities occurring within its sister State's borders. In particular, Oklahoma has sought to reduce nutrients entering the water through run-off from the application of a natural fertilizer - poultry litter - to Arkansas' agricultural lands.

8. Arkansas nevertheless has worked within the framework established by the Compact and the Commission to address issues of water quality in the region, including those potentially raised from the utilization of poultry litter as a natural fertilizer. Arkansas has entered into bilateral agreements with Oklahoma and has taken legislative action that has substantially revised the Arkansas Code with respect to water quality in "nutrient surplus areas." Ark. Code §§ 15-20-901 *et seq.*; 15-20-1101 *et seq.*; 15-20-1114.

9. Oklahoma has resorted to unilateral action. Specifically, Oklahoma claims the right to apply its statutes, common law and administrative regulations to commercial, agricultural operations occurring wholly within Arkansas. Oklahoma's action seeks to displace Arkansas law and substantially undermine an industry that is important to the Arkansas economy and a major source of Arkansas tax revenue.

## **II. FACTUAL BACKGROUND**

### **The Arkansas River Basin Compact**

10. The Arkansas River Basin is a watershed covering parts of the States of Arkansas and Oklahoma. The Arkansas River Basin drains the Arkansas River and its main tributaries, from a point near the confluence of the Grand-Neosho River and the Arkansas River near Muskogee, Oklahoma, to a point below the confluence of Lee Creek and the Arkansas River near Van Buren, Arkansas.

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11. This interstate drainage area encompasses several shared watersheds - including the Illinois River Watershed. The Illinois River Watershed covers approximately 1,069,530-acres and is almost equally divided between Oklahoma and Arkansas.

12. Because of the complex issues associated with water quality and apportionment for shared waters between two sovereign States, in 1955, the United States Congress granted consent to Arkansas and Oklahoma to negotiate and enter into a Compact for the management and apportionment of the Arkansas River Basin. Pub. L. No. 84-97, 69 Stat. 184.

13. The two States created the Arkansas-Oklahoma Arkansas River Compact Committee on March 14, 1956 and, with the assistance of various federal agencies, 14 years later formulated a Compact.

14. The Arkansas River Basin Compact between Arkansas and Oklahoma was executed on March 16, 1970 and ratified by the United States Congress on November 13, 1973. Pub. L. No. 93-152, 87 Stat. 569.

15. Two major purposes that motivated Oklahoma and Arkansas to enter into the Compact were to (1) “encourage the maintenance of an active pollution abatement program in each of the two States and to seek the further reduction of both natural and man-made pollution in the waters of the Arkansas River Basin” and (2) “facilitate the cooperation of [each state’s] water administration agencies ... in the total development and management of the water resources of the Arkansas River Basin.” Compact, art. I.

16. To assist in the implementation of the Compact’s objectives, the Compact, by its terms, created the Commission, consisting of three voting members from each State—the director of each State’s water regulatory agency and two Arkansas River Basin residents

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appointed by their respective governors—and, at the President’s discretion, a federal non-voting representative. Compact, arts. VII & VIII.

17. The Commission is vested with broad power to promulgate its own rules and regulations, and to “issu[e] such appropriate orders as it deems necessary for the proper administration of this Compact.” Compact, art. IX.

18. To facilitate these powers, the Commission also is authorized to “[h]old hearings and compel attendance of witnesses for the purpose of taking testimony and receiving other appropriate and proper evidence” and to “[c]ollect, analyze, and report on data as to stream flows, water quality, annual yields and such other information as is necessary for the proper administration of this Compact.” Compact, art. IX.

19. The Compact remains in “full force and effect until changed or amended by unanimous action of the States acting through their Commissioners and until such changes are ratified by the legislature of the respective States and consented to by the Congress of the United States in the same manner as this Compact [wa]s required to be ratified to become effective.” Compact, art. X.A.

20. The Compact additionally states: “Nothing in [it] shall be deemed: ... To interfere with or impair the right or power of either signatory State to regulate within its boundaries the appropriation, use and control of water within that State not inconsistent with its obligations under this Compact.” Compact, art. XI.B.

21. By so providing, the Compact protects each State’s ability to preserve the natural resources of the Arkansas River Basin while providing protections for the policy judgments that each State might make when confronted with the specific needs of communities and industries located within their borders.

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**Agricultural Practices in Arkansas**

22. Agriculture is an industry that provides a significant stimulus for economic growth in Arkansas, representing nearly 11% of the gross state product.

23. The poultry industry contributes significantly to this result, as millions of chickens and turkeys are raised on thousands of farms in Arkansas annually. These animals are used for food products, egg production, breeding and supply purposes.

24. Statewide, there are currently more than 4,000 poultry operations registered with the State of Arkansas. These poultry operations are located in 57 Arkansas counties, and the poultry industry on the whole accounts for more than 50,000 jobs and over \$1 billion in annual wages. Agriculture in general and poultry production in particular is an important source of Arkansas tax revenue.

25. A useful commercial byproduct of poultry production is poultry litter, which contains a variety of nutrients, making it a highly efficient and cost-effective fertilizer.

26. Poultry producers apply poultry litter on their own lands as a natural fertilizer, or barter or sell excess poultry litter to other ranches and farms which also use the poultry litter for land fertilization (“utilization of poultry litter”).

27. Poultry litter and its utilization is an integral part of the commercial and agricultural practices of Arkansas farmers in the Illinois River Watershed.

28. Arkansas has regulated the poultry industry, and the utilization of poultry litter as a natural fertilizer, in a manner that addresses and accounts for its effect on the Arkansas economy and its potential to cause pollution to natural resources.

**III. THIS COURT SHOULD DISMISS OKLAHOMA'S CLAIMS AS TO ACTIVITIES  
OCCURRING WITHIN ARKNSAS FOR FAILURE TO EXHAUST REMEDIES UNDER  
THE COMPACT**

29. Both Arkansas and Oklahoma, by negotiating the Compact, committed to collaborate in their efforts to control and reduce pollution in the shared interstate watersheds of the Arkansas River Basin. In so doing, they agreed to work cooperatively through the procedures set up in the Compact to address interstate pollution control within the Arkansas River Basin. The Commission created in accordance with the terms of the Compact has exercised its pollution-control responsibilities within the shared watersheds. See, *e.g.*, Minutes, Annual Meetings of the Arkansas-Oklahoma Arkansas River Basin Compact Commission (1981-2004) (documenting the Commission's jurisdiction over interstate pollution control concerning on-going nutrient-reduction projects).

30. Over time, monitoring programs in both Arkansas and Oklahoma have detected some increases in phosphorus compounds, suspended sediments and bacteria within some segments of the Illinois River Watershed.

31. A number of factors have contributed to these increases, including regional population growth and the expansion of local industries in both Oklahoma and Arkansas.

32. While Oklahoma focuses its attacks solely on the poultry industry, alleging that, through the utilization of poultry litter as a natural fertilizer, the industry causes the excess nutrients and other compounds in the water, Oklahoma's lawsuit omits any discussion of the contribution by other sources in degrading water quality in the region.



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33. Oklahoma's grievance - relating to the utilization of poultry litter as a natural fertilizer - is one that Oklahoma is required to submit to the Commission for resolution under the terms of the Compact.

34. Indeed, in 2003, consistent with the principles of cooperation articulated in the Compact, environmental officials from both States negotiated a "Statement of Joint Principles and Actions," committing both States to coordinate monitoring the release of pollutants and to develop, by 2012, measures for substantially reducing phosphorus and achieving other water-quality goals. Statement of Joint Principles and Actions (2003).

35. Also in 2003, the Arkansas General Assembly revised the Arkansas code to designate certain geographic areas as "nutrient surplus areas" subject to nutrient-management plans designed to protect water quality. See Ark. Code §§ 1520-901, *et seq.* (Arkansas Poultry Feeding Operations Registration Act); 15-20-1101, *et seq.* (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act); 15-20-1114 (governing potential conflicts between land application of poultry litter and Arkansas water and air pollution control laws).

36. These laws are administered by the Arkansas Natural Resources Commission, having adopted rules and regulations to balance the State's interest in protecting the shared watersheds from the adverse effects of excess nutrients with the competing interests in maximizing cost-effective soil fertility and plant growth.

37. Despite these collaborative efforts to regulate nutrient utilization within the Illinois River Watershed, Oklahoma abruptly abandoned Arkansas' and the Commission's good-faith efforts, and chose unilateral action rather than continued bilateral negotiation under the auspices of the Commission.

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38. Through its litigation strategy, Oklahoma seeks the right to directly apply its laws and regulations to conduct occurring wholly within Arkansas.

39. To that end, on August 19, 2005, Oklahoma filed its Amended Complaint herein against Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Aviagen, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc. Collectively, these companies contract with thousands of Arkansas citizens.

40. Oklahoma's amended complaint alleges that the defendants violated, among other things, Oklahoma statutory and common laws and regulations by allegedly polluting the Illinois River Watershed (a designated sub-basin of the Arkansas River Basin) with nutrients from the land-based application of poultry litter. See generally Okla. Amend. Compl.

41. By the plain language of its complaint, Oklahoma claims the right to regulate lawful commercial agricultural practices occurring within Arkansas under Oklahoma law.

42. For example, Oklahoma seeks to prohibit the use of poultry litter as a fertilizer within Arkansas. See Okla. Compl. ¶¶ 1, 69, VI.3 (requesting a permanent injunction requiring defendants to "immediately abate" poultry fertilizer usage within the [Illinois River Watershed]). As previously alleged, this is a lawful commercial, agricultural practice in Arkansas. The poultry farmers both use poultry litter on their own lands as a natural fertilizer, or barter or sell poultry litter to other farmers who do the same.

43. Enforcement of Oklahoma law within Arkansas will displace and render meaningless laws enacted by the Arkansas General Assembly and state regulations implementing those laws. Compare Okla. Compl. ¶¶ 1, 69, VI.3, with Ark. Code §§ 15-20-901, *et seq.*

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(Arkansas Poultry Feeding Operations Registration Act), 15-20-1001, *et seq.*(Arkansas Soil Nutrient Management Planner and Applicator Certification Act), 15-20-1101, *et seq.* (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act), 15-20-1114 (governing potential conflicts between land application of poultry litter and Arkansas water and air pollution control laws).

44. Oklahoma's decision to directly regulate out-of-state economic activity as a means to address its water quality concerns also circumvents a well-established process, set forth by the Compact, in which signatory States are required to present their grievances to the Commission for resolution through negotiation and collaboration.

45. Indeed, the Oklahoma Water Resources Board, an agency charged with protecting water quality, has conceded that "Arkansas and Oklahoma have essentially agreed through the Compact to pursue resolution of interstate pollution concerns through the Commission before resort to other available legal remedies." Pollution remedies and Jurisdiction Considerations Under the Arkansas River Basin Compact, Op. Gen. Counsel, Oklahoma Water Resources Board, at 2 (March 13, 1981).

46. Arkansas remains ready and willing to address these issues under the terms of the Compact, as agreed, but Oklahoma has refused to bring these issues before the Commission.

47. Accordingly, Oklahoma has violated the Compact by refusing to present its grievances to the Commission and by seeking to supplant Arkansas law and impose extraterritorial obligations on citizens of Arkansas.

48. Oklahoma's actions also will have a profound negative effect on the economy of Arkansas, reduce the tax revenues collected by Arkansas, and adversely affect interstate commerce in general.

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49. Compliance with Oklahoma law will impose substantial costs and burdens upon agriculture in Arkansas. The cost of compliance, including banning the utilization of poultry litter as a natural fertilizer, would cost the agricultural industry millions of dollars annually. This translates into a significant potential loss of tax revenue for Arkansas.

50. Additionally, compliance will lead to a loss of jobs and business in the Illinois River Watershed region, which will have a direct adverse effect on the health and welfare of all the citizens of Arkansas.

51. The Compact is an agreement between Arkansas and Oklahoma that has the force and effect of federal law. It imposes an express statutory obligation on the signatory States to abide by its terms and fulfill their obligations - which include cooperating to identify and abate pollution within the shared watersheds of the Arkansas River Basin.

52. The Compact precludes Arkansas and Oklahoma from interfering with or impairing the rights or powers of each State to exclusively regulate within its boundaries.

53. Arkansas and Oklahoma both agreed under the Compact to address their pollution-related grievances related to the shared watersheds of the Arkansas River Basin collaboratively, negotiating a resolution before the Commission, in lieu of litigation. Indeed such collaboration is necessary in order to effectively address interstate water quality concerns.

54. As previously stated, the Commission, through the cooperative efforts of the appropriate regulatory agencies in both states, has made progress in addressing water quality concerns in the Illinois River Watershed, and there is no reason to believe that the progress will not continue if the Commission is permitted to continue its mission under the terms of the federally recognized Compact.

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55. Oklahoma's complaint that the utilization of poultry litter as a natural fertilizer causes run-off creating increased nutrients in the waters within the Illinois River Watershed is an interstate grievance to be addressed before the Commission.

56. Although required by the Compact, Oklahoma has refused to allow the Commission to resolve this grievance through the procedures established by the Compact.

57. Instead, Oklahoma has taken unilateral action by claiming the right to directly regulate commercial and agricultural activity occurring within Arkansas and filing a lawsuit to enforce Oklahoma law within Arkansas in federal district court, thereby violating Plaintiff's rights under the Compact.

58. As a result of Oklahoma's evasion of its obligations under the Compact, and its attempt to regulate citizens and operations in Arkansas, Arkansas' comprehensive regulatory scheme is compromised.

59. Pursuant to Rule 12(b)(1) Oklahoma's claims should be dismissed for lack of subject matter jurisdiction, in that Oklahoma has failed to appropriately address its concerns through the Commission before resorting to litigation, as they agreed to do when entering the Compact.

#### **IV. VIOLATION OF THE COMMERCE CLAUSE OF ART. I, § 8, CL. 3 OF THE UNITED STATES CONSTITUTION**

60. Arkansas realleges Paragraphs 1 through 58 as if fully set forth herein.

61. The Commerce Clause vests Congress with the authority to "regulate Commerce ... among the several States," U.S. Const. art. I, § 8, cl. 3, and simultaneously precludes States from doing so. A State law that has the practical effect of regulating commerce that takes place

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wholly outside of the State's borders violates the Commerce Clause, whether or not the commerce has effects within the State. See *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989).

62. Poultry litter is an article of commerce. It is produced, bought, traded and sold within Arkansas, where it is applied to lands as a cost effective and highly efficient natural fertilizer that is used in commercial, agricultural operations.

63. Poultry is an article of commerce. Both live poultry and products derived from live poultry are produced, bought, traded and sold within Arkansas. The production of poultry creates poultry litter.

64. Oklahoma's actions violate the Commerce Clause because it purports to regulate commerce occurring wholly outside of Oklahoma's borders. By construing its statutory and common law and regulations to apply to commercial, agricultural activity occurring within Arkansas, Oklahoma imposes its legal standards on agricultural practices that occur on the Arkansas side of the Illinois River Watershed.

65. By bringing an enforcement action against Arkansas's agricultural industries, Oklahoma attempts to regulate conduct occurring outside its borders and imposes burdens upon out-of-state commerce, therefore, Oklahoma violates the Commerce Clause and its Amended Complaint should be dismissed as to any activities occurring within the State of Arkansas for failure to state a claim upon which relief can be granted.

## **V. VIOLATION OF THE SOVEREIGNTY GUARANTEED CO-EQUAL STATES BY THE UNITED STATES CONSTITUTION**

66. Arkansas realleges paragraphs 1 through 64 as if fully set forth within.

67. Arkansas has enacted extensive laws and regulations governing the use of poultry litter as a fertilizer within its borders.

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68. Arkansas' laws governing the use of poultry litter represent a set of deliberate policy choices to not only regulate some conduct but also to leave some conduct unregulated.

69. Having entered the Union with its "sovereignty intact," *Batchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), Arkansas has the exclusive authority to regulate conduct occurring within its borders subject only to the limitations placed upon it by the United States Constitution and applicable federal law.

70. Oklahoma lacks the constitutional authority to regulate conduct occurring in Arkansas and its claims as they address activities occurring within Arkansas should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

71. Oklahoma's attempt to apply its laws to activity occurring within the state of Arkansas which is lawful under Arkansas law is an affront to the dignity and sovereignty guaranteed Arkansas as a co-equal state by the structure of the United States Constitution and the "basic principle of federalism that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

## **VI. VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH**

### **AMENDMENT OF THE UNITED STATES CONSTITUTION**

72. Arkansas realleges paragraphs 1 through 70 as if fully set forth within.

73. Oklahoma claims the right to regulate the conduct of citizens of Arkansas - the utilization of poultry litter as a natural fertilizer - for activity occurring within Arkansas.

74. The utilization of poultry litter as a natural fertilizer is regulated by and is lawful under Arkansas law.

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75. Oklahoma's requested injunction barring the utilization of poultry litter would have a major adverse economic impact on thousands of Arkansas poultry growers and even more citizens of Arkansas whose livelihoods are based in part on the Arkansas poultry industry or who consume poultry products.

76. Oklahoma's attempt to impose its laws on lawful activity occurring within the borders of Arkansas violates the rights of Arkansas citizens under the Due Process Clause of the Fourteenth Amendment by punishing them for activity within Arkansas that is lawful under Arkansas law.

77. Acting as *pares patriae*, Arkansas has standing to assert the Due Process rights of its citizens in this Court, because the Due Process violations by Oklahoma implicate Arkansas's quasi-sovereign interest in the welfare of its citizens, its independent duty to protect their constitutional rights, and Arkansas's sovereign and constitutional right to exercise exclusive legislative power within its borders subject only to the United States Constitution and applicable federal law. Again, Oklahoma's claims should be dismissed for failure to state a claim upon which relief can be granted.

**PRAYER FOR RELIEF**

WHEREFORE, the State of Arkansas and the Arkansas Natural Resources Commission pray that the Court:

1. Dismiss Oklahoma's claims as they apply to activities occurring within the State of Arkansas under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and declare that, under the terms of the Compact, Oklahoma is subject to the jurisdiction of the Commission and is required to cooperatively resolve its interstate dispute by



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presenting its grievances before the Commission, before resorting to the jurisdiction of this Court.

2. Dismiss Oklahoma's claims as they apply to activities occurring within the State of Arkansas pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because Oklahoma has not stated a claim upon which relief may be granted due to the fact that its attempt to enforce its laws on citizens and conduct occurring within Arkansas violates the Commerce Clause, the Due Process Clause of the Fourteenth Amendment, and/or the sovereignty guaranteed co-equal states by the United States Constitution.

3. Award the State of Arkansas such further relief as this Court deems just and proper.

Respectfully submitted,

MIKE BEEBE  
Attorney General

**By:** \_\_\_\_\_

Teresa Marks, Ark. Bar No. 84117  
Deputy Attorney General  
Office of the Attorney General  
323 Center Street, Suite 200  
Little Rock, Arkansas 72201

Charles Moulton Ark. Bar No. 91105  
Senior Assistant Attorney General

William B. Federman, OBA 2853  
Jennifer F. Sherrill, OBA 19703  
FEDERMAN & SHERWOOD  
120 North Robinson, Suite 2720  
Oklahoma City, OK 73102  
Telephone: (405) 235-1560  
Fax: (405) 239-2112  
[wfederman@aol.com](mailto:wfederman@aol.com)